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Supreme Court, U.S.
FILED
951540 MAR 18 1996
OFFICE OF THE CLERK

No. _____

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

BUBBA HOKE, BARRY GRESHAM, and
WALKER COUNTY, TEXAS,
*Petitioners*,
*v.*
JED BLUDWORTH and JONELL BURNETT,
*Respondents*.

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the entry of a default judgment, solely on the basis of a minor procedural mistake made by a litigant's attorney, amounts to a denial of the litigant's right to procedural due process, in direct contradiction to the usual course of judicial proceeding and precedent, particularly where punitive damages have been awarded?

## LIST OF PARTIES

1. Bubba Hoke, Petitioner
2. Barry Gresham, Petitioner
3. Walker County, Texas, Petitioner
4. Jed Bludworth, Respondent
5. Jonell Burnett, Respondent

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## REFERENCE TO OPINIONS

1. The November 21, 1995, decision of the Court of Appeals for the Fifth Circuit, affirming the default judgment of the District Court, is unreported and appears at Appendix A.

2. The July 13, 1994, Interlocutory Judgment Nil Dicit of the United States District Court for the Southern District of Texas appears at Appendix B.

3. The July 13, 1994, opinion of the District Court on the Judgment Nil Dicit appears at Appendix C.

4. The August 9, 1994, order of the District Court, denying Defendants' motion to set aside the Judgment Nil Dicit, appears at Appendix D.

5. The September 21, 1994, Instructions and Special Interrogatories of the District Court appear at Appendix E.

6. The March 14, 1995, Amended Final Judgment of the District Court appears at Appendix F.

7. The March 14, 1995, order of the District Court regarding attorneys' fees appears at Appendix G.

8. The December 20, 1995, order of the Court of Appeals for the Fifth Circuit, denying Defendants' petition for rehearing, appears at Appendix H.

## STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered November 21, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case is based upon the district court's entry of a judgment nil dicit, following the court's decision to strike the Defendants' answer as untimely. Judgment nil dicit was originally a common law doctrine that was later incorporated into Federal Rule of Civil Procedure 55(a), which allows for the entry of default judgment:

> **Rule 55. Default**
>
> **(a) Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and the fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

Petitioners contend that an entry of default, made solely on the basis of a minor procedural mistake by a litigant's attorney and ultimately resulting in an award of punitive damages, deprives that litigant of his right to due process as established by the Fifth Amendment to the United States Constitution:

> No person shall be...deprived of life, liberty, or property, without due process of the law....

U.S. CONST. amend v.

## STATEMENT OF THE CASE

### A. JURISDICTION OF THE DISTRICT COURT.

The United States District Court for the Southern District of Texas exercised jurisdiction over this case under 28 U.S.C. §§ 1331 and 1343.

### B. FACTUAL AND PROCEDURAL HISTORY.

On February 10, 1993, Jed Bludworth and his mother, Jonell Burnett, filed a complaint against Donald Hoke, Barry Gresham, and Walker County, Texas, under 42 U.S.C. § 1983, alleging that these Defendants had violated their Fourth and Fourteenth Amendment rights to privacy and unreasonable search and seizure.

In their complaint, Plaintiffs alleged that in the early morning hours of August 26, 1992, Burnett telephoned the Huntsville Memorial Hospital to report that her son was ill. Plaintiffs claimed that approximately fifteen minutes after that conversation, Walker County Sheriff's Deputies Hoke and Gresham arrived at Plaintiffs' residence and informed Burnett that they had received a call from Huntsville Memorial Hospital regarding a disturbance. Plaintiffs alleged that, despite Burnett's request that the officers leave, Hoke entered the residence, hand-cuffed Bludworth, slammed him into the kitchen counter, and dragged him into the living room. The complaint further alleged that the deputies held him on the couch and hit him several times in the stomach. Plaintiffs claimed that Hoke and Gresham then dragged Bludworth to the patrol car and transported him to the Walker County jail, where he was allegedly denied medical attention and verbally abused and taunted by Walker County Sheriff's Department employees.

On March 22, 1993, Defendants filed a 12(b)(6) motion to dismiss, expressly setting forth the Plaintiffs' failure to properly plead a § 1983 claim and raising the issue of the deputies' qualified immunity. The trial court denied the motion to dismiss, and Defendants then filed a motion for summary judgment, asserting several defenses on the Defendants' behalf and again placing the merits of the case in issue. The trial court never ruled on the motion for summary judgment, and over the course of the following year, the parties engaged in substantial discovery.

Although the initial trial setting was May 24, 1994, Defendants' counsel did not realize until the weekend of May 16, 1994, that the Defendants' original answer, although prepared months earlier, had accidentally never been filed. Upon realizing the mistake, Defendants' counsel immediately prepared and filed, on May 17, 1994, the Defendants' original answer. The following day, Defendants' counsel filed Defendants' portion of the pre-trial order, which detailed their factual and legal contentions and, for the third time, placed the merits of the case in issue.

Less than a week before trial, on May 18, 1994, Plaintiffs filed a motion to strike the Defendants' original answer. The trial court continued the original trial setting, and on July 12, 1994, struck Defendants' original answer by virtue of an "Interlocutory Judgment Nil Dicit," effectively rendering a default judgment against Defendants. Defendants filed a motion to set aside the judgment nil dicit, a motion for leave to amend their answer, and a motion to amend the order to allow for interlocutory appeal, all of which were denied.

As a result of the default judgment, all facts alleged in Plaintiffs' complaint against Deputies Hoke and Gresham, as well as Walker County, were deemed true. A trial was

held, on the issue of damages only, resulting in a judgment against Defendants totaling $157,920.00, including attorney's fees and costs. Significantly, $100,000.00 of the judgment that was entered against Deputies Hoke and Gresham were punitive damages.

Defendants appealed the judgment nil dicit to the United States Court of Appeals for the Fifth Circuit, which issued an unpublished opinion affirming the trial court's judgment. Defendants then filed a petition for rehearing, which was also denied.

Despite the trial and appellate courts' refusal to hear their case, Defendants maintain that the entry of a default judgment, solely on the basis of a minor procedural mistake committed by their counsel, is not only unjust and contrary to the usual course of judicial proceeding and precedent, but it is also unconstitutional. Specifically, Defendants maintain that they have been denied their right to procedural due process, particularly since they were unable to defend themselves from those quasi-criminal allegations which ultimately provided the basis for an award of punitive damages. For this reason, Defendants now seek a writ of certiorari.

## REASONS FOR ALLOWANCE OF THE WRIT

### CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER THE ENTRY OF A DEFAULT JUDGMENT, SOLELY ON THE BASIS OF A MINOR PROCEDURAL MISTAKE MADE BY A LITIGANT'S ATTORNEY, AMOUNTS TO A DENIAL OF THE LITIGANT'S RIGHT TO PROCEDURAL DUE PROCESS, PARTICULARLY WHERE PUNITIVE DAMAGES HAVE BEEN AWARDED.

## A. SUMMARY.

In their complaint, Plaintiffs accused Defendants of egregious conduct, and for the next year and a half, Defendants engaged in extensive discovery and filed several pleadings and dispositive motions, including a pre-trial order, in an attempt to refute Plaintiffs' claims. However, less than a week before trial, the district court decided to continue the case and ultimately entered a default judgment against Defendants, solely because their counsel had, by oversight, failed to file an answer on their behalf and despite the fact that Defendants had continuously and vigorously defended themselves throughout the duration of the lawsuit.

Because of the entry of default judgment, Defendants were precluded from presenting their case to an impartial jury during a trial on the merits of the case. Instead, all allegations made in the Plaintiffs' complaint were deemed true by the district court, and Defendants were forced to participate in a trial on damages alone, unable to defend themselves against the egregious claims made against them. Through no fault of their own, Defendants were deprived not only of the monetary compensation they were forced to pay Plaintiffs, but they were also burdened by the quasi-criminal sanction of punitive damages and deprived of the opportunity to clear their good names, all in violation their Fifth Amendment right to procedural due process.

The action of the district court in entering the judgment nil dicit and the action of the appellate court, in affirming its decision, were in direct contradiction to the usual course of judicial proceeding and precedent. The great weight of case law on the issue of default judgments mandates that the entry of a judgment, absent a trial on the merits, is an extreme action that should be considered a

judicial remedy of last resort. Furthermore, the federal courts have consistently held that a default judgment should not be used to punish attorneys for their mistakes, particularly when their clients are blameless. Despite this precedent, the trial court entered the default judgment, and the appellate court ratified its action. Nevertheless, Defendants maintain that an injustice has been done to them, in violation of their constitutional rights, and thus they now seek relief from this Court.

### B. This Case Presents Important Issues Of Federal Law Which Have Not Been, But Should Be, Settled By This Court.

By virtue of the Fifth Amendment, the United States Constitution guarantees that individuals will not be deprived of life, liberty, or property without due process of law. This right has been held to extend to those parties embroiled in civil litigation; civil litigants "have a due process right to fully and fairly litigate each issue in their case." *duPont v. Southern National Bank of Houston*, 771 F.2d 874, 880 (5th Cir. 1985). Furthermore, the federal courts have cautioned against the use of judicial power in violation of constitutional rights, as "[t]he need for orderly administration of justice does not permit violations of due process." *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 916 (9th Cir. 1987). Indeed, as at this Court understood, even before the turn of the century, judicial power should never be used to deprive a litigant of the right to have his case adjudicated on its merits:

> To say that courts have inherent power to deny all right to defend an action, and to render decrees without any hearing whatever, is, in the very nature of things, to convert the court exercising such an authority into an

> instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

*Hovey v. Elliot*, 167 U.S. 409, 414, 17 S.Ct. 841, 843 (1897).

This reluctance to enter a default judgment in light of the necessity of preserving procedural due process is especially warranted where a litigant faces the possibility of the imposition of punitive damages. As the Texas Supreme Court has pointed out, "[p]unitive...damages are levied against a defendant to punish the defendant for outrageous, malicious, or otherwise morally culpable conduct." *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 16 (Tex. 1994). *See also, Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 47, 111 S.Ct. 1032, 1058-59 (1991) (O'Connor, J., dissenting). Thus, because punitive damages operate much like criminal sanctions, they are deserving of special procedural protection: "The legal justification for punitive damages is similar to that for criminal punishment, and like criminal punishment, punitive damages require appropriate substantive and procedural safeguards to minimize the risk of unjust punishment." *Id.* at 16-17. In this case, however, Defendants were completely prevented from putting on any type of evidence in their own defense. By virtue of a default judgment, for which they were not responsible, all issues of liability were automatically resolved against Defendants, leaving them with no means to fight the quasi-criminal sanction of punitive damages.

"A fundamental requirement of due process is 'the opportunity to be heard.'" *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965), quoting *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783 (1914).

However, through no fault of their own, Defendants were stripped of their constitutionally protected right to litigate those claims made against them. Under the auspices of the common law doctrine of judgment nil dicit, now incorporated into Federal Rule of Civil Procedure 55(a), *Giampaoli v. Califano*, 628 F.2d 1190, 1193 (9th Cir. 1980), the district court rendered Defendants in default and refused them their opportunity to be heard, despite full participation in discovery and other pre-trial proceedings. By affirming that decision, the Fifth Circuit compounded the district court's unconstitutional act.

The Supreme Court has yet to speak on the issue of whether a district court may constitutionally render a party in default where that party has done nothing of its own accord to warrant such an action. Therefore, given the grave result in this case and the importance of the constitutional and procedural doctrines involved, this Court should consider this issue in order to do justice for these Defendants and to prevent other litigants from suffering a similar deprivation of their rights.

### C. The Fifth Circuit's Affirmance In This Case Effectively Leaves In Place A Judgment Which Conflicts With Other Cases Of Similar Facts.

By entering what basically amounted to a default judgment against Defendants, the district court acted in a manner contrary to the usual course of judicial proceeding and precedent. The federal judiciary has consistently held that default judgments are to be used sparingly, as a means of last resort, in consideration of the strong policies favoring the resolution of disputes on their merits. *Farnese v. Bagnasco*, 687 F.2d 761, 764 (3d Cir. 1982); *Jackson v. Beech*, 636 F.2d 831, 835 (D.C. Cir.

1980); *GFI Computer Indus., Inc. v. Fry*, 476 F.2d 1, 5 (5th Cir. 1973); *Tolson v. Hodge*, 411 F.2d 123, 130 (4th Cir. 1969).

The reluctance to enter a default judgment against a litigant is particularly great when the party has demonstrated a desire to defend the suit. *Sun Bank of Ocala v. Pelican Homestead & Sav. Ass'n*, 874 F.2d 274, 276 (5th Cir. 1989). Thus, default judgments should only be entered when the adversary process has been halted because of an essentially unresponsive party. *Id.*; *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970). In this case, Defendants actively participated in the defense of Plaintiffs' suit and were completely unaware that they were technically in default until a week before trial. By choosing to enter the default judgment against Defendants, the district court not only ignored their previously asserted meritorious defenses, but it ignored federal judicial precedent as well.

More importantly, the district court used the default judgment as a means of punishing defense counsel, despite the unfortunate effect of depriving the actual Defendants of the opportunity to defend themselves. This approach has been expressly disapproved by the federal courts: "A default judgment deprives the client of his day in court, and should not be used as a vehicle for disciplining attorneys." *Shepard Claims Service, Inc. v. William Darrah & Associates*, 796 F.2d 190, 195 (6th Cir. 1986); *Jackson* at 837.

Furthermore, where the failure to answer is the result of a minor procedural mistake of counsel, default is not an appropriate remedy, and courts should not fail to distinguish between the fault of the attorney and the blamelessness of the client. *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 811 (4th Cir. 1988).

Rather, "courts should be 'reluctant to attribute to the parties the errors of their legal representatives.'" *A.F. Dorfmeyer Co., Inc. v. M.J. Sales & Distributing Co., Inc.*, 461 F.2d 40, 43 (7th Cir.1972), quoting *Barber v. Turberville*, 218 F.2d 34, 36 (D.C. Cir. 1954). "[J]ustice demands that a blameless party not be disadvantaged by the errors or neglect of his attorney which cause a final, involuntary termination of proceedings." *Lolatchy v. Arthur Murray, Inc.*, 816 F.2d 951, 953 (4th Cir. 1987).

In this case, Defendants had absolutely nothing to do with the circumstances surrounding the district court's decision to enter a default judgment. Unfortunately, in order to punish their counsel, the court deprived Defendants of their ability to defend themselves, in spite of the wide range of less drastic remedies the court could have employed in order to redress the error of their attorneys. *See, e.g., Pressey v. Patterson*, 898 F.2d 1018, 1021 (5th Cir. 1990). This result, however, deprived Defendants of their constitutional right to due process, in direct contradiction to judicial proceeding and precedent.

## CONCLUSION AND PRAYER

For the foregoing reasons, Petitioners respectfully pray that this Court grant writ of certiorari.

Respectfully submitted,

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## APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 94-20925
No. 95-20168
Summary Calendar

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JED BLUDWORTH and JONELL BURNETT,
Plaintiffs-Appellees,

VERSUS

BUBBA HOKE, BARRY GRESHAM, and
WALKER COUNTY, TEXAS
Defendants-Appellants.

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Appeals from the United States District Court
for the Southern District of Texas

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(CA-H-93-398)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Donald Hoke, Barry Gresham, and Walker County ("defendants") appeal a default judgment, two evidentiary rulings, and an award of attorney's fees. We affirm as to the default judgment and evidentiary rulings and remand for reconsideration of the amount of attorney's fees.

Jed Bludworth and Jonell Burnett ("plaintiffs") brought this § 1983 action against Walker County and two of its sheriff's deputies, Hoke and Gresham ("deputies"), alleging that the deputies forced their way into Burnett's house, brutally assaulted Bludworth, and arrested and imprisoned Bludworth without cause. Defendants filed a timely motion to dismiss for failure to state a claim, which the district court denied, and the parties engaged in substantial discovery during the following twelve months. Defendants later filed an answer, one week before the scheduled start of trial and eleven months after it was due. They also filed a portion of a proposed pretrial order the following day. Plaintiffs moved to strike the untimely answer, and the court issued a "judgment nil dicit," striking the answer and accepting the allegations of the complaint as true.

After a trial on damages, a jury awarded Bludworth and Burnett $10,000 each for mental anguish and $50,000 each in punitive damages. The court then awarded them $37,800 in attorney's fees.

II.

A.

Defendants argue that the district court erred in granting "judgment nil dicit." The district court entered the judgment because defendants first failed to file a timely answer and then filed an untimely one in bad faith. As defendants answered eleven months late, and the court had reminded them on several occasions of the need to file an

answer, the court found that their delay in answering was willful. The court also found that the late answer was an improper general denial, as it failed to admit many facts that were not reasonably in issue. Because defendants had completed sixteen months of discovery before making the general denials on the eve of the trial, the district court concluded that they did not answer in good faith.

Defendants contend that they avoided default by (1) presenting meritorious defenses in their motion to dismiss, motion for summary judgment, and proposed pretrial order; (2) showing good cause for their failure to answer timely; (3) actively defending the suit; and (4) causing no prejudice to plaintiffs. They also argue that default judgment is improper when defense attorneys, rather than defendants themselves, cause the default.

Plaintiffs respond that the district court's finding that defendants willfully failed to answer is not clear error. Plaintiffs also argue that defendants have never presented meritorious defenses, as the late answer is an invalid general denial, and the proposed pretrial order was never entered. In their reply, defendants concede that reversal is not mandatory; rather, they ask us to exercise our supposed discretion to reverse the district court's exercise of its discretion.

B.

We interpret the "judgment nil dicit" as an entry of default judgment pursuant to FED. R. CIV. 55(b)(2), which permits a district court to enter a judgment of default against a party who has appeared in an action but failed to plead. We review a district court's judgment of default for abuse of discretion and its subsidiary findings of fact for clear error. *CJC Holdings v. Wright & Lato*, 979 F.2d 60, 63-64 (5th

Cir. 1992). Because we favor adjudicating cases on their merits, "even a slight abuse [of discretion] may justify reversal." *Id.* at 63 n.1 (quoting *Williams v. New Orleans Pub. Serv.*, 728 F.2d 730, 734 (5th Cir. 1984)); *In re Dierschke*, 975 F.2d 181, 183 (5th Cir. 1992).

We must determine whether there is "good cause" to set aside the default. We may consider a variety of factors, including "whether the default was willful, whether setting it aside would prejudice the adversary, and whether a meritorious defense is presented." *CJC Holdings*, 979 F.2d at 64. If a defendant's failure to plead does not result from excusable neglect, it is within the district court's discretion to enter default judgment without considering other factors. *Id.*; *Dierschke*, 975 F.2d at 184.

C.

The district court found that defendants willfully failed to file a timely answer, implicitly rejecting their claim of excusable neglect. The court found that the delay was willful because (1) it asked defendants several times to file an answer, and (2) defendants "have no explanation for the eleven-month delay." This finding is not clear error.

Defendants first contend that the district court reminded them only once, not several times, of the need to file an answer. Their only support for this contention is their attorney's affidavit. We accept the district court's version of what occurred.

Defendants next argue that the district court ignored conclusive proof that their neglect is excusable. The district court observed in its opinion on the "judgment nil dicit" that defendants had offered no explanation for their failure to file a timely answer. In their motion to set aside the judgment,

defendants claimed that they had prepared an answer months earlier but forgot to file it. The district court denied the motion, implicitly rejecting this excuse.

The district court's disbelief is not clear error. First, defendants failed at least twice——once after the motion to dismiss was denied and once after the conceded warning——to file their answer. Second, the answer they did eventually file violated FED. R. CIV. P. 8(b), which prohibits general denials. Defendants admit as much, arguing that pretrial order superseded the pleadings and relieved them of the need to file an answer meeting the minimal requirements of the Federal Rules of Civil Procedure. Third, defendants took a contrary position in the district court, arguing implausibly in their motion to set aside the judgment that they had "admitted to all material factual assertions which they c[ould]" in their answer. Finally, defendants' "conclusive[]" proof consists only of their own attorneys' self-serving affidavits and computer records. Defense counsel overestimate their credibility.

Finally, defendants' active defense of this case is irrelevant. Rule 55 permits judgment by default when a party "has failed to plead *or* otherwise defend." FED. R. CIV. P. 55(a) (emphasis added). Default judgment is proper on *either* basis. *See generally* 6 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 55.03[1] (2d ed. 1991). "[O]therwise defend[ing]" does not save defendants from their failure to plead.

Defendants' failure to file a timely answer did not result from excusable neglect. Thus, the judgment of default is not an abuse of discretion.

III.

The deputies contend that the district court erred by (1) excluding their testimony as to their states of mind and (2) ruling that if the deputies testified about their net worth, it would permit plaintiffs to introduce evidence of the deputies' liability insurance. We review a district court's evidentiary rulings for clear error. *Williams v. Briggs Co.*, 62 F.3d 703, 707 (5th Cir. 1995).

A.

The deputies contend that evidence of their states of mind is relevant to the determination of punitive damages. Under Texas law, and award of punitives depends in part upon "the degree of culpability of the wrongdoer." *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981).

Accepting the allegations of the complaint as true, the district court read a statement to the jury describing a brutal and unprovoked assault during which the deputies slammed Bludworth into a kitchen counter, dragged him into another room by his hair, shoved his face into a sofa cushion, and responded to Burnett's pleas to let her son up and stop suffocating him by lifting Bludworth up and then kneeing him in the groin and hitting him several times in the stomach. The district court did not abuse its discretion by finding that the intent behind the deputies' actions spoke for itself.

B.

The deputies next contend that they were entitled to testify about their net worth, because a defendant's ability to pay is relevant to the award of punitive damages. The district court agreed, ruling that (1) the deputies could inject

their ability to pay into the case, and (2) if they did so, plaintiffs could also present evidence of the deputies' ability to pay, including their liability insurance.

The deputies argue only that the latter ruling violated FED. R. EVID. 411.[1] Rule 411 excludes evidence of liability insurance only as proof of fault; it does not speak to damages. 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURES § 5364 (1980). This argument is meritless.

IV.

Defendants claim that the district court's award of $37,800 in attorney's fees is excessive, because (1) plaintiffs' attorneys failed to keep sufficiently detailed records, (2) plaintiffs obtained only limited success at trial, and (3) the lead attorney's claimed billing rate is exorbitant. We review the district court's award of attorney's fees for abuse of discretion and findings of fact supporting the award for clear error. *Shipes v. Trinity Indus.*, 987 F.2d 311, 319 (5th Cir.), *cert. denied*, 114 S.Ct. 548 (1993). The district court awarded plaintiffs $36,400 for 113 hours worked by their lead counsel, at the rate of $325 per hour, and $1,400 for 22 hours of work by another attorney with a lower billing rate.

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[1] The rule states:

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongly. *This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose*, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

FED. R. EVID. 411 (emphasis added).

A.

Defendants' first two contentions are meritless. First, we have reviewed the time records and found them to be "sufficiently detailed to allow the [district] court to make an independent evaluation of whether the hours claimed are justified." *In re Lawler*, 807 F.2d 1207, 1212 (5th Cir. 1987).

Second, $37,800 is not excessive in light of "the significance of the overall relief obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). Bludworth and Burnett each received $10,000 for emotional harm and $50,000 in punitive damages. If the deputies truly believe that the award of $100,000 in punitives is a poor result for plaintiffs, the jury should have awarded more.

B.

Defendants are correct that $325 is a high hourly rate in the Houston market. Plaintiffs prepared a memorandum on fees awarded in other cases in Houston, however, showing that awards of up to $300 have not been uncommon. Defendants countered with evidence of only (1) the rate awarded in one old case and (2) their own billing rate of $100 per hour. Plaintiffs observe:

> While [defense] counsel's hourly rate is undoubtedly justified, given his manifest command and mastery of the Federal Rules of Civil Procedure . . . the rate charged by [defense counsel], who presented no controverting evidence or affidavits to establish the reasonableness of plaintiffs' attorney's fees[,] fails to present any meaningful challenge to the district court's award.

Plaintiffs are correct that based upon the lopsided record before the district court, its finding that $325 is a reasonable hourly rate is not, by itself, clear error.

C.

A district court may not base its fee award only upon awards in other cases, however; instead, it must consider the twelve *Johnson* factors in determining the amount of a reasonable fee. *Cobb v. Miller*, 818 F.2d 1227, 1231 (5th Cir. 1987). These factors include the skill necessary to litigate the case, the time and labor required, the difficulty of the questions presented, time limitations, and counsel's experience. *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974). While we need not remand solely because a district court fails to make solid findings on each of the twelve *Johnson* factors, we must remand when the record does not clearly indicate that the district court considered those factors. *Cobb*, 818 F.2d at 1232.

The district court did not write an opinion on its fee award. Instead, the court's conclusions appear in an excerpt of a hearing transcript, in which the court made only two relevant findings: (1) that plaintiffs are entitled to fees for all of the hours claimed and (2) that "for a [p]laintiff's civil rights lawyer operating in South Texas under the practical and legal constraints . . . $325 an hour is a reasonable rate for reasonably necessary time spent."

While the district court's reasoning appears sound, it is also incomplete. Under *Johnson*, a district court must make an individualized fee determination. Obviously, a court would abuse its discretion by awarding the same amount in every case; similarly, a determination based solely upon rates awarded in other cases, without consideration of

whether those cases are comparable in light of the *Johnson* factors, would warrant reversal.

We may affirm only after reviewing a record that demonstrates that the court's discretion was guided by proper factual and legal criteria. *Blanchard v. Bergeron*, 893 F.2d 87, 89 (5th Cir. 1990). This appears to have been a straightforward case for plaintiffs, especially in light of the shortcomings of defense counsel, and $325 per hour is at the high end of the range of reasonable hourly rates. The district court should have explained its award in light of the relevant *Johnson* factors.

We AFFIRM the "judgment nil dicit" and evidentiary rulings and REMAND for reconsideration of the reasonable amount of attorney's fees.

## APPENDIX B

| | | |
|---|---|---|
| UNITED STATES DISTRICT COURT | | SOUTHERN DISTRICT OF TEXAS |
| JED BLUDWORTH, *et al.*, Plaintiffs, | § | |
| *versus* | § | CIVIL |
| | § | ACTION: |
| BUBBA HOKE, *et al.*, Defendants. | § | H-93-398 |

INTERLOCUTORY JUDGMENT NIL DICIT

1. The defendants' answer is struck.

2. A judgment is rendered holding them liable.

3. A trial on damages will be set soon.

Signed July 12th, 1994, at Houston, Texas.

/s/
Lynn N. Hughes
United States District Judge

## APPENDIX C

**UNITED STATES DISTRICT COURT** — **SOUTHERN DISTRICT OF TEXAS**

| | | |
|---|---|---|
| JED BLUDWORTH, *et al.*, Plaintiffs, | § | |
| *versus* | § | CIVIL ACTION: |
| BUBBA HOKE, *et al.*, Defendants. | § | H-93-398 |

### OPINION ON JUDGMENT NIL DICIT

1. *Introduction*

Jed Bludworth and Jonell Burnett ask the court to strike the answer of Bubba Hoke, Barry Gresham, and Walker County and to render a judgment on liability. When the defendants answered over eleven months late, it was in the form of a general denial. The defendants' answer will be struck and a judgment nil dicit rendered against them.

2. *Background*

On February 10, 1993, Bludworth and his mother, Burnett, filed a complaint alleging that Bubba Hoke and Barry Gresham, deputies of the Walker County Sheriff, violated their civil rights through the two deputies' entering

the mother's house without a warrant, beating Bludworth, and arresting him without probable cause.

The defendants appeared on March 9, 1993, to request an extension of time to respond. The extension was granted, and on March 22 the defendants moved to dismiss the case for failure to state a claim. It was denied on May 24, making the answer date June 7.

The defendants answered one year later, on May 17, 1994. Their answer was essentially a general denial of Bludworth's complaint. Bludworth now requests that the defendants' answer be struck because it was not filed within ten days of the denial of the motion to dismiss and because a general denial is an improper answer. FED. R. CIV. P. 12(a), 8(b). The defendants have never asked for more time to answer.

3. *Chronology*

| | |
|---|---|
| February 10, 1993: | Bludworth and Burnett file their complaint. |
| March 9, 1993: | Defendants move to extend time to respond. |
| March 10, 1993: | Extension is granted through March 22. |
| March 22, 1993: | Defendants move to dismiss for failure to state a claim. |
| May 24, 1993: | Motion to dismiss is denied. |
| June 7, 1993: | Answer is due. |

| | |
|---|---|
| May 17, 1994: | Defendants answer with a general denial. |
| May 19, 1994: | Bludworth moves to strike the answer. |
| June 9, 1994: | Defendants respond to the motion to strike. |

4. *Late Answer.*

Because the defendants moved to dismiss before the original answer deadline and because the motion was denied on May 24, 1993, they had until June 7 to serve Jed Bludworth with their answer. FED. R. CIV. P. 12(a). Without explanation, the defendants answered only on May 17, 1994, eleven months late.

The defendants contend that their delay is a mere technicality. The law requires the failure to answer on time to have been a mistake or a minor lapse to be excusable. *Moriani v. Hunter*, 462 F.Supp. 353, 354-55 (S.D.N.Y. 1978) (answer three weeks late because of an identifiable mistake.) *United States ex rel. Houghton v. Scranton*, 257 F. Supp. 557, 558-59 (E.D. Pa. 1966) (answer less than one month late).

Because of the delay for the motion to dismiss, the defendants had three months after they were served to answer. Instead, their answer came over fifteen months after service. They knew how to request more time to answer, as they had done it once before. The defendants were also told several times in pre-trial conferences to answer. The facts compel the conclusion that the defendants' delay was willful. They have no explanation for the eleven-month delay. The

defendants' dilatory conduct serves only to complicate the judicial process.

5. *General Denial.*

When the defendants finally did see fit to answer Bludworth's complaint, they filed a qualified general denial. Although general denials are appropriate in limited circumstances, the defendants' use of a general denial here is manifestly improper, for there had been a hearing on a motion to dismiss and much discovery completed, allowing the defendants to know everything they needed to answer fully and precisely.

General denials are disfavored and are acceptable only if they are made in good faith. 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1265 (1990). *White v. Smith*, 91 F.R.D. 607, 608 (W.D.N.Y. 1981). The defendants claim, after 15 months into the lawsuit, they can admit only that (a) Walker County is within the Southern District of Texas; (b) Hoke and Gresham are deputies of the Walker County Sheriff, and (c) Hoke and Gresham responded to a call at Bludworth's residence at the time and date in the complaint. The answer denies jurisdiction and venue. It also denies that Bludworth, Burnett, Hoke, and Gresham are residents of Walker County. It is impossible to believe that the defendants, in good faith, deny all but a minute portion of Bludworth's 53 paragraph complaint. After all, they had 16 months of discovery to learn what they could admit or deny.

Since Bludworth moved to strike, the defendants have had more than a month to seek permission to amend their answer. They have not. Instead, in the defendants' response to Bludworth's motion to strike, they essentially reaffirm the general denial. One of the purposes of an answer is to

narrow the scope of a lawsuit. 5 WRIGHT AND MILLER, *supra* § 1202. By responding to Bludworth's complaint with a general denial, the defendants defeated this purpose, complicating this protracted litigation. Their answer is not made in good faith. The defendants have had three opportunities to raise a meritorious defense. They could have given some meaningful defense in their motion to dismiss, their answer, or their response to the motion to strike. They did not.

6. *Conclusion.*

Because the defendants have offered no explanation for their eleven-month delay in filing an answer and have raised no meritorious defense with their general denial, their answer will be struck. "[A] judgment by default is one taken against the defendant for failure to appear, being distinguished from a judgment nil dicit, which [is] the appropriate form of judgment where, after appearance, the defendant failed to plead within the proscribed time." 3 A.C. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 1262 (5th ed. 1925). This court, therefore, will render a judgment nil dicit against the defendants on the question of their liability. The facts in the complaint are accepted as true, and a trial will be held to determine damages.

Signed July 12th, 1994, at Houston, Texas.

/s/

Lynn N. Hughes
United States District Judge

## APPENDIX D

UNITED STATES DISTRICT COURT — SOUTHERN DISTRICT OF TEXAS

| | | |
|---|---|---|
| JED BLUDWORTH, *et al.*, Plaintiffs, | § | |
| | § | CIVIL |
| *versus* | § | ACTION: |
| | § | H-93-398 |
| BUBBA HOKE, *et al.*, Defendants. | § | |

ORDER

The defendants' motion to set aside the judgment nil dicit is denied.

Signed August 8th, 1994, at Houston, Texas.

/s/
Lynn N. Hughes
United States District Judge

## APPENDIX E

UNITED STATES DISTRICT COURT — SOUTHERN DISTRICT COURT OF TEXAS

| | | |
|---|---|---|
| JED BLUDWORTH, *et al.*, Plaintiffs, | § | |
| | § | CIVIL |
| *versus* | § | ACTION: |
| | § | H-93-398 |
| BUBBA HOKE, *et al.*, Defendant. | § | |

### COURT'S INSTRUCTIONS AND SPECIAL INTERROGATORIES

You are instructed that you should assess the amount you find to be full, just, and reasonable compensation for all of Bludworth and Burnett's damages. Damages must not be based on speculation. Consider these elements of damage and no others. Consider each element of damage separately. Do not include interest.

A. *Pain*. Pain means physical suffering.

B. *Anguish*. Anguish means emotional pain, torment, and suffering.

*Question One.*

What sum of money if paid now in cash, would fairly and reasonably compensate Jonell Burnett for her anguish that resulted from the violation of her rights?

Answer in dollars, if any.

Answer: 10,000

*Question Two.*

What sum of money if paid now in cash, would fairly and reasonably compensate Jed Bludworth for his pain and anguish that resulted from the violation of his rights?

Answer in dollars, if any.

Answer: 10,000

You may also make an award of punitive damages against Hoke and Gresham, but not the County. Punitive damages are to punish a party for extreme or outrageous conduct or to deter others from acting unconstitutionally, including failing to act constitutionally.

If you determine that the defendant's conduct was so shocking and offensive as to justify an award of punitive damages, you may award them. The law does not require you to award punitive damages; however, if you decide to award them, you must use sound reason in setting the amount. Neither the award itself nor the amount of an award may reflect bias, prejudice, or sympathy. The amount can be as large or as small as you believe necessary to fulfill the purposes of punitive damages. You may impose punitive

damages against one of the defendants and not the other, or against both in different amounts, or against neither.

*Question Three.*

What amount, if any, should be awarded to Burnett as punitive damages?

Answer in dollars, if any.

Bubba Hoke: 25,000

Barry Gresham: 25,000

*Question Four.*

What amount, if any, should be awarded to Bludworth as punitive damages?

Answer in dollars, if any.

Bubba Hoke: 25,000

Barry Gresham: 25,000

/s/
Foreman of the Jury

9-21-94 /s/
Lynn N. Hughes
United States District Judge

## APPENDIX F

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UNITED STATES DISTRICT COURT — SOUTHERN DISTRICT OF TEXAS

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| | | |
|---|---|---|
| JED BLUDWORTH, *et al.*, Plaintiffs, | § | |
| | § | CIVIL |
| *versus* | § | ACTION: |
| | § | H-93-398 |
| BUBBA HOKE, *et al.*, Defendants, | § | |

### AMENDED FINAL JUDGMENT

1. Jonell Burnet recovers $10,000 for mental anguish from Bubba Hoke, Barry Gresham, and Walker County, jointly and severally.

2. Jed Bludworth recovers $10,000 for mental anguish from Bubba Hoke, Barry Gresham, and Walker County, jointly and severally.

3. Burnett recovers $25,000 punitive damages from Bubba Hoke.

4. Burnett recovers $25,000 punitive damages from Barry Gresham.

5. Bludworth recovers $25,000 punitive damages from Bubba Hoke.

6. Bludworth recovers $25,000 punitive damages from Barry Gresham.

Signed March 9th, 1995, at Houston, Texas.

/s/
Lynn N. Hughes
United States District Judge

## APPENDIX G

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UNITED STATES DISTRICT COURT — SOUTHERN DISTRICT OF TEXAS

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| | | |
|---|---|---|
| JED BLUDWORTH, *et al.*, Plaintiffs, | § | |
| | § | CIVIL |
| *versus* | § | ACTION: |
| | § | H-93-398 |
| BUBBA HOKE, *et al.*, Defendants. | § | |

ORDER ON ATTORNEYS' FEES

Jed Bludworth and Jonell Burnett recover from Bubba Hoke, Barry Gresham, and Walker County, jointly and severally:

A. $36,400 attorney's fees for Harry Walsh, III;

B. $1,400 attorney's fees for Gerald M. Birnberg; and

C. $120 costs.

Signed March 9th, 1995, at Houston, Texas.

/s/
Lynn N. Hughes
United States District Judge

## APPENDIX H

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20925

JED BLUDWORTH; JONELL BURNETT
Plaintiffs - Appellees

v.

BUBBA HOKE; BARRY GRESHAM; WALKER COUNTY TEXAS
Defendants - Appellants

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Appeal from the United States District Court
for the Southern District of Texas, Houston

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**ON PETITION FOR REHEARING**
(December 20, 1995)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge